

NOT TO BE PUBLISHED

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

RICARDO BARRERA, JR.,

Defendant and Appellant.

C043853

(Sup.Ct. No. 02F06370)

A jury convicted defendant Ricardo Barrera, Jr., of assault with a firearm (Pen. Code, § 245, subd. (b))¹ with personal use of a firearm (§ 12022.5, subd. (a)), discharging a firearm at an inhabited dwelling house (§ 246) and discharging a firearm in a grossly negligent manner (§ 246.3). Sentenced to an aggregate term of 13 years in state prison, defendant appeals.

¹ Undesignated statutory references are to the Penal Code unless otherwise indicated.

On appeal, defendant contends he is entitled to reversal because the court failed to instruct the jury sua sponte with CALJIC No. 2.71 that defendant's admission should be viewed with caution. Defendant also contends the trial court's imposition of the upper term was in violation of *Blakely v. Washington* (2004) 542 U.S.____ [159 L.Ed.2d 403] (*Blakely*). We shall affirm the judgment.

BACKGROUND

On July 27, 2002, Rene and Georgia Guerrero² were visiting at the home of Georgia's parents. While Rene was washing his van in the driveway, Georgia alerted him to a passing tan Oldsmobile that had driven by several times that evening. The Oldsmobile made a U-turn and came to a stop at the nearby intersection. Rene heard the driver, subsequently identified as defendant, yell "big timer Scrappa" out of the window -- a derogatory phrase used by Norteno gang members when referring to a person who is "high up or deep into" the Sureno gang. Bethany Rasmussen, a neighbor who was also outside washing a car at the time, heard someone in the car yell "fucking chap" (a derogatory term Surenos use to describe Nortenos), "I'm going to kill you," "I'm going to shoot you," "You can't hurt me," and other gang slurs. Rasmussen saw someone flashing gang hand signs out of the open driver's window and heard people outside the house of Georgia's parents yelling gang insults back and trading gang

² Because these witnesses share the surname Guerrero, we shall use first names. We intend no disrespect.

hand signs. The people in the car were wearing blue -- a color identified with the Sureno gang. The people in front of the home were wearing red -- a color identified with the Norteno gang.³ Georgia did not hear anyone in front of the house yelling back.

Rene and Georgia saw defendant stick his hand out the car window and point at the house. Rene then saw flashes coming from defendant's hand and heard four to six gunshots. Rene also saw something black in defendant's hand but was not certain whether it was a gun. Georgia also heard the shots and saw the flashes, and saw defendant's hand outside the window when the shots were fired. Rasmussen saw the flashes and heard the gunshots as well, but could not be certain who was doing the shooting.⁴ Just moments before the shooting, she saw defendant lean back in his seat, the front passenger lean forward in his seat and saw a black gun come up into view. From her vantage point, she was unable to discern who was holding the gun. After the shooting, the Oldsmobile sped off.

³ We recognize that, considering the color worn by the car's occupants and the other derogatory phrases yelled from the car, it appears inconsistent that defendant called anyone a "big timer Scrappa," as that is a derogatory term used to insult the wrong gang. The parties, however, did not elaborate on this apparent inconsistency.

⁴ Rasmussen recalled that the shouting had occurred when the car drove by the first time, and the shooting occurred when the car drove by a second time.

Accompanied by a friend, Rene followed the speeding Oldsmobile in his car while calling the police from his cellular telephone. A California Highway Patrol officer saw the speeding Oldsmobile and gave chase, eventually completing a traffic stop. Although a search of the Oldsmobile failed to produce a firearm, several unexpended .25 caliber semiautomatic bullets were found on the floorboard. Gunshot residue was found on defendant's hand, the steering wheel and the driver's side door. Three expended .25 caliber semiautomatic cartridges were found in the street where the shots had been fired.

DISCUSSION

I.

Defendant argues the trial court's failure to instruct the jury sua sponte that his admission should be viewed with caution denied him his federal and state constitutional rights to a fair trial and due process of law. We conclude there was no evidence of an admission by defendant that required the instruction and that, in any event, any error was harmless.⁵

Defendant is correct that the court must instruct the jury sua sponte in accordance with CALJIC No. 2.71 when there is evidence of an admission. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1224 (*Bunyard*), quoting *People v. Beagle* (1972) 6 Cal.3d 441, 455 (*Beagle*).) The purpose of the admonition is to aid the

⁵ As noted by the parties, the record indicates the trial court refused to instruct the jury with CALJIC No. 2.71, although there is no indication who requested the instruction or why it was refused.

jury in determining whether the admission was, in fact, made by the defendant. (*People v. Bemis* (1949) 33 Cal.2d 395, 400.) In this case, however, there was no evidence of an admission by defendant.

Prior to the shooting, one witness heard defendant yell "big timer Scrappa" and another witness heard someone in the car yelling gang slurs and threats to the effect of "I'm going to kill you" and "I'm going to shoot you." Defendant argues that these preoffense statements amounted to an admission which had a tendency to prove that he had a willingness to harm the victim and personally fired the shots as alleged.

As a defense at trial, however, defendant never denied he was the driver of the Oldsmobile or that someone in the Oldsmobile fired the shots. Instead, defendant maintained that the passenger, not he, fired the handgun. No one ever specifically attributed the statements to defendant and the fact that "someone" made the statements was consistent with defendant's theory of defense.

In any event, even if we were to construe the evidence of the statements yelled from the car as admissions, we would find any error in failing to instruct to the jury with CALJIC No. 2.71 harmless on this record. The trial court's failure to give CALJIC No. 2.71 is not reversible error if, on reweighing the evidence, the appellate court concludes it is not reasonably probable that the jury would have reached a verdict more favorable to the defendant absent the error. (*Bunyard, supra,*

45 Cal.3d at p. 1224; *Beagle, supra*, 6 Cal.3d at pp. 455-456; *People v. Watson* (1956) 46 Cal.2d 818, 836-837.)

In *People v. Carpenter* (1997) 15 Cal.4th 312 (*Carpenter*), a murder case, the Supreme Court held that the failure to give CALJIC No. 2.71 was harmless under "the normal standard of review for state law error." (*Carpenter, supra*, 15 Cal.4th at p. 393.) The Supreme Court explained that the failure to give the cautionary instruction was not one of the very narrow categories of error that render a trial fundamentally unfair. (*Ibid.*) After reviewing the record, the Supreme Court noted that the defendant's admission involved five "simple" words -- "'I want to rape you'" -- spoken when defendant had the witness's full attention. (*Id.* at pp. 392, 393.) It continued, "[T]he court fully instructed the jury on judging the credibility of a witness, thus providing guidance on how to determine whether to credit the testimony. Accordingly, there is no reasonable probability the error was prejudicial; indeed, we would even find the error harmless beyond a reasonable doubt." (*Id.* at p. 393.)

The same is true in the case before us. There was testimony that defendant yelled the derogatory gang slur, "big timer Scrappa," prior to the shooting. The evidence was inconclusive regarding who yelled the threats to kill from the car and the prosecutor never specifically attributed those comments to defendant. Thus, the evidence, even if believed, was not inconsistent with defendant's theory at trial, i.e., that it was the passenger who actually did the shooting.

Moreover, the trial court fully instructed the jury on how to assess witness credibility using CALJIC Nos. 2.13 [prior consistent or inconsistent statements as evidence], 2.20 [believability of witness], 2.21.1 [discrepancies in testimony], 2.21.2 [witness willfully false], 2.22 [weighing conflicting testimony], 2.27 [sufficiency of testimony of one witness], and 2.61 [defendant may rely on state of evidence].

II.

The trial court sentenced defendant to the upper term of nine years for assault with a firearm (§ 245, subd. (b)), a consecutive four years for the firearm enhancement (§ 12022.5, subd. (a)), a concurrent five years for discharging a firearm at an inhabited dwelling (§ 246) and a concurrent two years for having discharged the firearm in a grossly negligent manner (§ 246.3). The court found as aggravating factors that the crime was gang related, there was a potential for multiple victims, the facts supported more serious charges than those filed and the crime was callous in nature. The court also considered the mitigating factors that defendant was youthful and had no prior criminal history.

In supplemental briefing, defendant contends the trial court violated his right to a jury determination of any facts that increase his sentence beyond the statutory maximum when it imposed the upper term of nine years for assault with a firearm. (*Blakely v. Washington* (2004) 542 U.S. ____ [159 L.Ed.2d 403] (*Blakely*).)

Applying the Sixth Amendment to the United States Constitution, the United States Supreme Court held in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*) that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried by a jury and proved beyond a reasonable doubt. (*Id.* at p. 490.) For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant. Thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional factfindings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely, supra*, 542 U.S. ___, ___ [159 L.Ed.2d 403, 413-414].)

The Attorney General contends defendant has waived or forfeited this constitutional claim because he failed to raise it in the trial court. Assuming, but not deciding, that defendant has not forfeited his claim of *Blakely* error, his contention fails on the merits.

Under California's determinate sentencing law, the punishment for most offenses is expressed as a sentence range consisting of an upper, middle, and lower term. The selection of the term to be imposed is made by the trial court, applying the sentencing rules of the Judicial Council. (Pen. Code, § 1170, subds. (a)(3), (b).)

The court "shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of

the crime.” (Pen. Code, § 1170, subd. (b).) The sentencing rules set forth a nonexclusive list of circumstances which may be considered in aggravation and mitigation. (Cal. Rules of Court, rules 4.408, 4.421, 4.423.) Notably, “[a] fact that is an element of the crime shall not be used to impose the upper term.” (Cal. Rules of Court, rule 4.420(d).)

Together, the Penal Code and the sentencing rules of the Judicial Council create a sentencing scheme in which (1) there is a presumption in favor of the middle term, (2) the presumption can be overcome in favor of the upper term only if at least one circumstance in aggravation is found to be true, and (3) the elements of the offense cannot be considered as aggravating factors.

In most instances, a jury verdict or a defendant’s plea will reflect only the elements of the offense. In such cases, the statutory middle term is “the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” (*Blakely, supra*, 542 U.S. at p. ____ [159 L.Ed.2d at p. 413], italics omitted.) Accordingly, imposition of the upper term in such cases falls squarely within the holding of *Blakely*, and the defendant is entitled to a jury trial on facts, other than a prior conviction, used to increase the penalty beyond the statutory maximum that could be imposed based solely on facts reflected by the jury’s verdict or admitted by the defendant.

Generally, the failure to submit factual issues to the jury is a structural error that requires reversal per se. (*Sullivan*

v. Louisiana (1993) 508 U.S. 275, 279-281 [124 L.Ed.2d 182, 189-190].) More recently, the United States Supreme Court has indicated partial denial of the right to a jury trial is not always reversible per se. In *Neder v. United States* (1999) 527 U.S. 1, 8-15 [144 L.Ed.2d 35, 46-51], the court held the failure to instruct a jury on an element of a crime, such that the element is never submitted to a jury, can be harmless. "[W]here a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." (*Id.* at p. 17.)

In *People v. Sengpadychith* (2001) 26 Cal.4th 316, the California Supreme Court addressed whether and to what extent *Apprendi* error should be subject to harmless error analysis. In *Sengpadychith*, the trial court submitted a charged gang enhancement to the jury, but did not instruct the jury on one element of the enhancement. (*Id.* at p. 322.) The California Supreme Court concluded this *Apprendi* error was subject to harmless error review under the federal *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed. 2d 705] standard. The error was reversible "unless it can be shown 'beyond a reasonable doubt' that the error did not contribute to the jury's verdict." (*People v. Sengpadychith*, at p. 326; see also *People v. Smith* (2003) 110 Cal.App.4th 1072, 1079, fn. 9 [following *Sengpadychith*]; *U.S. v. Nealy* (11th Cir. 2000) 232 F.3d 825, 829 ["*Apprendi* did not recognize or create a structural error that

would require per se reversal”]; *U.S. v. Swatzie* (11th Cir. 2000) 228 F.3d 1278, 1283 [“The error in *Neder* is in material respects indistinguishable from error under *Apprendi*” and thus *Apprendi* error is subject to harmless error review].)

The Attorney General contends any *Blakely* error here is harmless because overwhelming and uncontradicted evidence presented at trial established the crime was gang related, was particularly callous and had a potential for multiple victims and these facts were conceded at sentencing. We agree and have no doubt that, at the very least, the jury would have reached the conclusion that the crime was gang related under the reasonable doubt standard. (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 271.)

As recounted above, the People introduced compelling and uncontroverted evidence that the crime was related to a dispute between the Sureno and Norteno street gangs. Those involved, including defendant, were wearing gang colors, yelling gang insults and trading gang hand signs. Defendant did not testify to the contrary, presented no defense and made no claim that the crime was not gang related. In fact, defendant conceded as much both in closing argument and at sentencing. Thus, any *Blakely* error was harmless beyond a reasonable doubt.

Only a single aggravating factor is necessary to impose the upper term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433-434.) Once an aggravating factor is found and the upper term is permissible, the judge has the discretion to consider other aggravating factors not found by the jury in deciding whether to

impose the upper term. (See *U.S. v. Booker* (2005) ____ U.S. ____
[160 L.Ed.2d 621].)

DISPOSITION

The judgment is affirmed.

MORRISON, J.

We concur:

BLEASE, Acting P.J.

BUTZ, J.